

## **MINUTES**

### **MONTANA SENATE 57th Legislature - SPECIAL SESSION COMMITTEE ON JUDICIARY**

**Call to Order:** By **CHAIR LORENTS GROSFIELD**, on August 5, 2002 at 1:00 P.M., in Room 303, Capitol.

#### **ROLL CALL**

**Members Present:**

Sen. Lorents Grosfield, Chair (R)  
Sen. Duane Grimes, Vice Chair (R)  
Sen. Al Bishop (R)  
Sen. Steve Doherty (D)  
Sen. Mike Halligan (D)  
Sen. Ric Holden (R)  
Sen. Walter McNutt (R)  
Sen. Jerry O'Neil (R)  
Sen. Gerald Pease (D)

**Members Excused:** None.

**Members Absent:** None.

**Staff Present:** Judy Feland, Committee Secretary

**Please Note:** These are summary minutes. Testimony and discussion are paraphrased and condensed.

**Committee Business Summary:**

Hearing(s) & Date(s) Posted: SR1, 8/05/2002  
Executive Action: SR1

**{Tape : 1; Side : A; Approx. Time Counter : 0}** Comment: This is a very poor quality tape, barely audible at times.

**Sponsor:** CHAIRMAN LORENTS GROSFIELD

**Opening statement by sponsor:** Vice chairman DUANE GRIMES called upon CHAIRMAN GROSFIELD to present SR1, a resolution of the Senate of the State of Montana concurring in, confirming and consenting to the nomination and appointment, made by the Chief Justice of the Montana Supreme Court and submitted to the Senate,

of the Honorable C. Bruce Loble as Montana's Chief Water Judge. He surmised that he may have carried the original bill in 1991 to confirm Judge Loble and had sponsored two or three prior reappointments. He told the committee that Judge Loble had been picked from a field of applicants in 1991 and to his recollection was the only applicant in private practice at that time.

**Proponents:**

**Karla Gray, Chief Justice of the MT Supreme Court**  
**Mike Murphy, Montana Water Resources Association**  
**SENATOR BILL TASH, SD 17, Dillon**

**Opponents:** None.

**Proponents Testimony:**

**Chief Justice of the MT Supreme Court, Karla Gray,** sought the support of the committee for her reappointment of Chief Water Judge Loble to another four-year term. She said Judge Loble had first been appointed by her predecessor, Chief Justice Turnage in 1990 and had been reappointed twice after. She had made her appointment in June of 2001. Unlike that original appointment, she said, this time there were only two applicants for the job. She said it was a difficult job that she could not be paid enough to take. Judge Loble had come from a large private practice that specialized in natural resource and water law and with his father, had written on the topic. She recommended his skill, competency in the extreme and his dedication to this particular job, saying the issues were often confrontational and disputatious between neighbors and friends across the state of Montana. She praised his institutional memory that she felt was critical to this lengthy and statewide process. She commended Chief Water Judge Loble to the committee.

**Mike Murphy, represented the Montana Water Resources Association,** saying the association wished to go on record in support Judge Loble's confirmation. Adjudication of Montana's water rights is an extremely difficult, but very important job, he maintained. He told the committee that Judge Loble was an exceptional individual doing an exceptional job addressing the very difficult task with the resources available.

**SENATOR BILL TASH, SD 17, Dillon,** said he'd had the privilege of working with Judge Loble through the Reserved Water Right Compact Commission. He recommended confirmation to the full Senate by the Judiciary Committee.

**Comments from C. Bruce Loble:** At the invitation of **Vice Chairman GRIMES**, the judge addressed the committee. He introduced his wife, Sally. He reminded the committee that the job of the Water Court was to adjudicate 219,000 claims for water rights that existed before July 1, 1973 across the entire state. The date was important, he explained, because at that time the Legislature created the Water Use Act. Prior to that, a person could get a water right simply by going out on the stream, diverting it and putting it to beneficial use and they found that 67% of all water rights did not have a paper attached to them. The Water Use Act of 1973 mandated a permit from the Department of Natural Resources and Conservation, and anyone not complying would not have a water right. The Legislature also set the criteria which have changed somewhat from Legislature to Legislature, but he said you could not get a new water right that adversely affected other water users, those that existed prior to July 1, 1973. He said the DNRC had a difficult time determining whether or not an application post-1973 had any effect on the water rights prior to 1973. In 1979 the Legislature created the Water Court as part of a statewide adjudication effort, dragged in all the water users in Montana, saying they had to file a statement of claim of water rights. By 1982, they had 219,000 claims and also had the unusual jurisdiction for a state court over federal and Indian Reserve water rights. In addition to the Water Court, the Legislature created the Reserved Water Rights Compact Commission which was charged with negotiating with the federal and Indian reserved water right holders, coming up with compacts. He said the court had approved the Fort Peck, Northern Cheyenne and Rocky Boy compacts, and had others yet pending.

**Judge Loble** explained a chart of the State of Montana and the 85 hydrologic drainage basins throughout the state. The colors represented basins where the court had issued decrees, including temporary, preliminary and final decrees. He said after 219,000 claims had been processing for several years, the court was starting to bear fruit. In the Mussellshell and Gallatin basins, the court was actually enforcing the water court decrees for the first time in Montana and one of the first in the entire Western U.S. He said on the Mussellshell just this year they gave their water court decree to the district judge and that judge was currently enforcing their decision from the North and South Forks of the Mussellshell, down through Harlow, Roundup and down through Mosby. They had put six water commissioners on in an attempt to distribute 250 miles of river in an equitable fashion. He said it was going extremely well with people on the lower end of the Mussellshell getting water rights for the first time in many, many years during a period of drought here in Montana.

**Questions from Committee Members and Responses:**

**SENATOR RIC HOLDEN** said during the 1995 session he was the chairman of a sub-committee of the Judiciary Committee that looked at petitions from people who wanted to re-open the water right filings, saying they'd lost them in the mail or their attorneys were negligent. The outcome was that the committee felt they'd had enough extensions and they would not re-open those claims. He wondered if the judge was still receiving complaints from the public who felt their water rights weren't correctly adjudicated.

**Judge Loble** replied that the court was not hearing much about the late claim issue. The Legislature had originally said that the Supreme Court was to set a deadline for the filing of the statements of claim for 1982, saying if they didn't file, people would forfeit their water right claims. The Legislature re-opened that issue in 1993, giving people another chance to file water right claims by July 1, 1996, and the court received 4,900 additional water right claims. The subsequent water rights claims were made insubordinate to the timely-filed claims. It had caused some concern because people claimed they had filed water right claims before the DNRC by 1982 that were not either lost, or not recognized. The Martinsdale Colony on the Mussellshell, for example, had objected to the distribution of water through the district judge there. The judge had certified the issue to the water court to resolve whether claim was made in 1982 or 1996. By and large, most people were not claiming that the Legislature did them wrong, the judge answered.

**VICE PRESIDENT GRIMES** asked if the judge was aware of the letter from the Legislature 1999 about the lack of clearly established rules for procedure that was alleged before the body. He asked the judge for an update.

**Judge Loble** told the committee that two public meetings separated by several months on the proposal drafting rules after the committee sent the letter. They'd sent 250 notices out to interested water users and they'd received about 17 comments. After a public meeting in Bozeman which approximately 11 people attended, they broke into a sub-committee and drafted proposed rules which were finally submitted to the water court. More changes were made where appropriate and public notice was again sent out to the 250 people. Four comments were received. Another public hearing was held on rules and they were currently working on a submission to the Supreme Court in the next few months.

**VICE PRESIDENT GRIMES** inquired if the intent would be to expedite some matters related to water court.

**Judge Loble** said it mostly concerned water rights that appeared on their face to be inaccurate or fictitious. There was a dispute in the legal community about how to proceed, he explained. There were some who said the water court should take them in on the court's own motion to examine and review them. Others averred that the water court should do nothing, saying they had no obligation under the Constitution or otherwise to find out whether a water right was valid and that the concept was designed for the public to do that. Another aspect of the rules was how they used the DNRC if they thought a problem existed with a water right. In the past years they had requested assistance from the DNRC saying they had a water right that looked to be a problem. They asked for information and research and then used the DNRC as an expert witness providing an opportunity for the witness to be cross-examined.

**VICE CHAIRMAN GRIMES** complimented Judge Loble on his longevity and tenacity on the complicated water issues. He said the Legislature had no idea how huge the issue would become when they enacted the whole concept, nor did they realize how much time it would take. He wondered if the Judge had comments about the timelines and how the Legislature could help in expediting the process.

"There isn't a problem that couldn't be solved if you give us enough money," **Judge Loble** said of the resource-driven adjudication. Back in 1982, the DNRC had an enormous amount of FTE's working on it, but the Legislature had reduced that number from 39 to 20 approximately. The DNRC was important because they examined each statement of claim since 1982, looking at water surveys and aerial photos that were taken in the late 40's and early 50's. They were down to nine FTE's currently and as a result were down from two claims per day to .9 per day. It would take 17 additional years to complete examination of the claims left undone. The court could go no faster than the DNRC, he claimed. The problem was that they were Constitutionally-protected property rights. One of the things that would make it go faster would be to lean on the water users, giving them 60-90 days to get their claims in and have hearings, but it would be horrible for water users. They tried to let people go through the process without the use of lawyers or consultants because of the expense, he said. They had created a video for people taking them step-by-step through the adjudication effort. They also offered workbooks and guidebooks along with trained mediators and water lawyers and consultants to help them as well. It was complex, he said, and the water rights were fundamental to the

property owners so they took their jobs seriously, unfortunately taking longer than anticipated.

**SENATOR MIKE HALLIGAN** spoke about the growing water demands from our neighbors to the south: Mexico, Nevada and California. The McCarran Amendment focused the jurisdiction at the state level to be able to adjudicate the water rights, he said, and then asked how confident the judge was that the temporary and preliminary decrees would withstand threat by Congress to moderate that amendment delving into the jurisdiction of the states, allowing the threat of southern states to take water.

**Judge Loble** said the bigger threat was through such laws as the Endangered Species Act and the Clean Water Act where Congress was taking a more aggressive attitude in terms of water. They were not so concerned with the scope and extent of quantity of water rights. 45 million acre feet of water on the average left the Montana boundaries from all directions each year. We don't consume much water, he claimed. Water was on the radar screen as we enter the fourth year of drought, he said. Time-Warner had recently visited his office doing an upcoming article on drought, conferring with his office and were in the Mussellshell area doing interviews. He used California as an example of how many novel ways people tried to draw water away from other states to urban and metropolitan areas.

**SENATOR HOLDEN** inquired about coalbed methane gas and if producers were required to get water rights.

**Judge Loble** replied that it was not the area he dealt with, but the DNRC said they didn't need a water right. He said laws during the last session said you could withdraw water if you didn't use it for a beneficial purpose, but he said that's what they were doing to some extent with coalbed methane. The water wasn't drawn for a beneficial purpose, but coming out with the methane and they had to get rid of it. He said disputes of that nature would probably go to the district court, but if a water right was involved, the district court could certify the dispute to the water court. It could happen in the instance of someone withdrawing water for coalbed extraction purposes and another person claiming injury for water rights. The extraction person could claim they had no water right to be injured, so it could then be certified by the district court to the water court to resolve a water right.

**VICE CHAIRMAN GRIMES** thanked the judge and complimented his work.

Closing by Sponsor:

**CHAIRMAN GROSFIELD** said that he and most people involved in agriculture remembered April 30, 1982 very well as the date when water claims had been due. He commented on the complexity and continuity of the water issues. New judges every few years would complicate the process, he averred. **Judge Loble's** dedication had been very evident in his presentation to the committee. Although he noted some frustration with the timelines but the issue of Constitutionally-protected water rights would have to work through the process. Some claims were being completed, but if the work were to be finished earlier the Legislature would have to write a check. He was concerned that if a claim came from a downstream entity, it would be better to be 7/10 rather than 2/10 complete. The water rights community was by and large confident in the process and understood that it took time, the Senator said. He urged adoption of the resolution to keep **Judge Loble** as the water judge for another four years.

**EXECUTIVE ACTION ON SR1**

**Motion/Vote:** SEN. HALLIGAN moved that SB1 DO PASS. Motion carried 9-0.

**ADJOURNMENT**

Adjournment: 1:45 P.M.

---

SEN. LORENTS GROSFIELD, Chair

---

Judy Feland, Secretary

LG/jf

**EXHIBIT(jus01aad)**